Supreme Court, U.S.
FILED
FEB 7 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1516

In The

Supreme Court of the United States

October Term, 1985

MATTEO GIAMMARIO, OSCAR GIBSON, EDWARD HIRSCH, CHARLES HOGAN, WALTER KRICHLING, OCTAVIUS LA CROSS, EARL MURPHY, EVE PANARO, and TOBY PONTANI,

Petitioners,

v.

TRENTON BOARD OF EDUCATION and TRENTON ADMINISTRATORS and SUPERVISORS ASSOCIATION,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of New Jersey

BRIEF IN OPPOSITON TO PETITION FOR CERTIORARI

ROTTKAMP & FLACKS
Attorneys for Respondent Trenton Board of Education
795 Parkway Avenue
Lexington Mews, Suite A-6
Trenton, NJ 08618
(609) 882-0556

ROBERT B. ROTTKAMP, JR., Esq.
Of Counsel and on the Brief

ROBERT M. SCHWARTZ
2109 Pennington Road
Trenton, NJ 08638
(609) 771-9080
Attorney for Trenton Administrators and Supervisors Association

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

COUNTERSTATEMENT OF THE QUESTION PRESENTED

Whether the New Jersey Law Against Discrimination bars an employer and a labor union from bargaining for a multi-tiered salary schedule which may unintentionally result in the payment of a lesser longevity benefit to older employees who had previously passed longevity milestones.

TABLE OF CONTENTS

Page

COUNTERSTATEMENT OF THE QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

COUNTERSTATEMENT OF THE CASE 1

ARGUMENT:

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE PETITIONERS CLAIM OF ARBITRARY DISPARATE IMPACT IS WITHOUT MERIT 3

A. Both the State Trial Court and the New Jersey Appellate Division Judgment rests on Adequate and Independent State Grounds thus this Court lacks Jurisdiction 3

B. Review Should not be Undertaken as there Exists no Important and Substantial Federal Question to Decide as the State Courts merely applied the well-founded Principles of Griggs v. Duke Power Co. to the Statutory Scheme of the New Jersey Law Against Discrimination 6

CONCLUSION 9

TABLE OF AUTHORITIES

Page

Cases Cited

Angel v. Bullington, 67 S.Ct. 657, 330 U.S. 183, 91 L.Ed. 832 (1947) 6

Fox Film Corp. v. Muller, 56 S.Ct. 183, 296 U.S. 207, 80 L.Ed. 158 (1935) 5

Geller v. Markham, 653 F.2d 1027 (2 Cir. 1980), *cert. den.*, 451 U.S. 945 (1981) 8

Griggs v. Duke Power Co., 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971) 7, 8

Groppi v. Wisconsin, 400 U.S. 505, 507, 91 S.Ct. 490, 491, 27 L.Ed.2d 571 (1971) 6

Herman v. Fairleigh Dickinson Univ., 183 *N.J. Super* 500 (App. Div. 1982), *cert. den.* 91 *N.J.* 573 (1982) 9

Hortonville Joint School Dist. No. 1 Hortonville Ed. Ass'n., 96 S.Ct. 2308, 426 U.S. 482, 49 L.Ed. 2d 1 (1976) 6

Jankovich v. Indiana Toll Road Comm., 85 S.Ct. 493, 379 U.S. 487, 13 L.Ed.2d 439 (1965) 5

Johnson v. New Jersey, 86 S.Ct. 1772, 1782, 384 U.S. 719, 735, 16 L.Ed.2d 882 (1966) 5

Lamb Enterprises, Inc. v. Kiroff, 399 F.Supp. 409 (D.C. Ohio, 1975) 5

McCoy v. Shaw, 48 S.Ct. 519, 277 U.S. 302, 72 L.Ed. 891 (1928) 5

Murdock v. Memphis, 20 Wall. 590, 22 L.Ed. 429 (1875) 5

Peper v. Princeton University Board of Trustees, 77 N.J. 55, 81 (1978) 5

TABLE OF AUTHORITIES—Continued

Page

Statutory Authorities

28 U.S.C. § 1257(3) 6
28 U.S.C.A., U.S. Sup. Ct. Rule 17 10
29 U.S.C. 623(a) 4
29 U.S.C. 623(f) 7, 8
42 U.S.C. § 2000e-2 4
N.J.S.A. 10:5-1 ..... 3, 4
N.J.S.A. 10:5-12 4
N.J.S.A. 10:5-13 9
N.J.S.A. 10:5-27 9

Textbook and Law Reviews

15 Creighton L. Rev. 749 (1982), Note, The Supreme Court Dismissal of State Court Appeals for Want of Substantial Federal Question 6
20 B.U.L. Rev. 501 (1940), Ulman & Spears 6
16 Wright, Miller & Cooper, Jurisdiction § 4014 6

COUNTERSTATEMENT OF THE CASE

Plaintiffs are, or have been, employees of defendant, Trenton Board of Education (Board), and members of defendant, Trenton Administrators and Supervisors Association (TASA). Prior to July 1, 1979, the negotiated bargaining agreement between the Board and TASA provided for a $400.00 per year increment for employees from and after their 20th year of employment and $200.00 per year from and after the 35th and 40th years.

For the period commencing July 1, 1979, a new contract was negotiated between defendants which provided for annual increments of $600.00 from and after the 20th, 25th, 30th, 35th and 40th years of service.

It is unquestionable and admitted by the defendants Board and Association (TASA), that the clear intent at the negotiating table and at the ratification meetings was that there would be no retroactive application of the new contract to those employees who had already passed the longevity milestones. The longevity provision has been interpreted and applied uniformly to mean that employees who have reached their longevity anniversaries prior to the effective date of the 1979 contract are not eligible for a payment at the increased rate of $600.00 per year until the next milestone is reached. Again, there would be no retroactive application of the new contract provision to those who had previously passed the appropriate milestones. This interpretation was confirmed as the contractual intent of the defendants in an arbitration proceeding and award between TASA and the Board.

For example, although plaintiff, Giammario, passed his 20th year of service in 1973, after July 1, 1979, he re-

ceived the prior longevity increment of $400.00 pursuant to the prior contract rather than one of $600.00 under the 1979 contract. Similarly, although he passed his 25th year of credited service in 1978, he received no increased longevity after July 1, 1979, because the prior contract did not recognize the 25th year as a milestone. However, under the 1979 contract, when he reaches his 30th year of service, he will receive an annual increment of $600.00, and continue to receive an increment of $400.00 for his 20th year of service with the Board.

A renewal contract of July 1, 1982, has similar longevity provisions and has been applied uniformly to all employees by the defendants.

Plaintiffs and defendants entered into a stipulation of facts and on September 17, 1984, presented their respective positions before the Honorable Paul G. Levy, J.S.C.

On October 1, 1984, Judge Levy issued a written opinion finding that the longevity provision discriminatorially impacted on the basis of age contrary to the New Jersey Law Against Discrimination (LAD).

On December 12, 1984, defendant Board filed a notice of appeal to the Appellate Division from the whole of the final judgment entered by the court on October 24, 1984.

By decision dated August 8, 1985, the New Jersey Appellate Division reversed the trial court finding that the incidental collateral effects of the longevity provision, in the absence of intentional discrimination, did not constitute age discrimination in violation of the LAD.

On October 3, 1985, the New Jersey Supreme Court issued an Order denying the petition for certification.

On December 31, 1985, this Petition for Writ of Certiorari was mailed to the Clerk of the United States Supreme Court.

———o———

ARGUMENT

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE PETITIONERS CLAIM OF ARBITRARY DISPARATE IMPACT IS WITHOUT MERIT.

A. Both the State Trial Court and the New Jersey Appellate Division Judgment rests on Adequate and Independent State Grounds thus this Court lacks Jurisdiction.

On October 3, 1985, the New Jersey Supreme Court entered an Order denying the plaintiffs' Petition for Certification. That Petition was filed to request review of a decision of the Superior Court of New Jersey, Appellate Division which reversed the trial court. This controversy involves an age discrimination claim.

Contrary to the Statement of Jurisdiction contained in the appellants' brief, both the trial court and the appellate court decided the matter on state grounds and not a federal statute. Though the trial courts reliance upon the New Jersey Law Against Discrimination, *N.J.S.A.* 10:5-1 *et seq.*, is not clear, there appears to be sufficient indication that the court based its decision on state grounds. In discussing the limitations issue the court stated:

> "Thus the court must determine the wilfulness of the alleged violation if there is liability under the ADEA.

> However, it is unnecessary to make that determination because *N.J.S.A.* 10:5-12 prohibits an employer from discriminating against an employee in compensation because of the employee's age." (A-18)

The most telling indication is the trial courts statement:

> "Thus the court must reach and decide the basic issue: does the differential application of longevity pay emanate from a policy prohibited by the [New Jersey] Law Against Discrimination." [*N.J.S.A.* 10:5-1 *et seq.*] (A-19).

Thus, clearly the trial court's decision was based upon state grounds. The State Appellate Court made it absolutely clear that it was deciding the issue based upon state grounds. In its decision it states:

> "In this case we are asked to consider whether the New Jersey Law Against Discrimination, *N.J.S.A.* 10:5-1 *et seq.*, (LAD) bars an employer . . . " (A-3)

Again, the Appellate Court made it clear in its discussion of the merits that the basis of its decision was the state anti-discrimination law.

> "Employment discrimination due to age (or any other invidious classification), is barred by LAD. 'It shall be unlawful employment practice, or, as the case may be, an unlawful discrimination . . . for an employer, because of . . . age . . . to discriminate against such individual in compensation . . . ' *N.J.S.A.* 10:5-12a. Similar provisions are contained in the federal Age Discrimination in Employment Act, 29 *U.S.C.* 623(a) (ADEA). In a sex discrimination case arising under the LAD, our Supreme Court held that the test for a *prima facie* showing was the same as that used in federal cases arising under Title VII of the Civil Rights

Act of 1964, 42 U.S.C. § 2000e-2 *et seq.* See *Peper v. Princeton University Board of Trustees*, 77 *N.J.* 55, 81 (1978)." (A-6)

Thus, it is obvious that this matter was decided upon the New Jersey Law Against Discrimination and not the federal ADEA. However, the court justifiably and appropriately analyzed state and federal cases arising under Title VII and the ADEA.

The New Jersey Supreme Court denied appellants' petition for certification without explanation.

The United States Supreme Court cannot review a case, even though it may contain a federal question, if there is an adequate state ground that supports the decision of the state court. *Murdock v. Memphis*, 20 Wall. 590, 22 L.Ed. 429 (1875). Thus, there can be no review if the state court has decided the case on some ground of state law, and has not reached a federal question that may be present. *McCoy v. Shaw*, 48 S. Ct. 519, 277 U.S. 302, 72 L.Ed. 891 (1928); *Johnson v. New Jersey*, 86 S.Ct. 1772, 1782, 384 U.S. 719, 735, 16 L.Ed. 2d 882 (1966).

Likewise, there can be no review where the state court has decided both the state and federal questions, if its decision of the federal question was unnecessary in light of its disposition of the state question. *Fox Film Corp. v. Muller*, 56 S.Ct. 183, 296 U.S. 207, 80 L.Ed. 158 (1935); *Jankovich v. Indiana Toll Road Comm.*, 85 S.Ct. 493, 379 U.S. 487, 13 L.Ed. 2d 439 (1965). See also, *Lamb Enterprises, Inc. v. Kiroff*, 399 F. Supp. 409 (D.C. Ohio, 1975) reversed on other grounds 549 F.2d 1052, certiorari denied 97 S.Ct. 2927, 431 U.S. 968, 53 L.Ed. 2d 1064 (1976). Additionally, this Court is bound to accept interpretation of

state law by the highest court of the State. *Hortonville Joint School Dist. No. 1 v. Hortonville Ed. Ass'n.*, 96 S.Ct. 2308, 426 U.S. 482, 49 L.Ed. 2d 1 (1976); *Groppi v. Wisconsin*, 400 U.S. 505, 507, 91 S.Ct. 490, 491, 27 L.Ed. 2d 571 (1971).

Clearly, the Court cannot review this matter based upon adequate state grounds supporting the decision.

B. Review Should Not be Undertaken as there Exists no Important and Substantial Federal Question to Decide as the State Courts merely applied the well-founded Principles of Griggs v. Duke Power Co. to the Statutory Scheme of the New Jersey Law Against Discrimination.

Under the statute, 28 *U.S.C.* § 1257(3), there must be a federal question in order to invoke the jurisdiction of the Supreme Court. Whether there is such a question in the case is a matter that the Court must decide for itself. *Angel v. Bullington*, 67 S.Ct. 657, 330 U.S. 183, 91 L.Ed. 832 (1947). The mere presence of a federal question will not permit review, however, unless that federal question is "substantial." 16 Wright, Miller & Cooper, Jurisdiction § 4014; Ulman & Spears, 20 B.U.L. Rev. 501 (1940); Note, the Supreme Court Dismissal of State Court Appeals for Want of Substantial Federal Question, 15 Creighton L. Rev. 749 (1982).

Assuming, *arguendo*, that the lower courts used the federal statute, the ADEA, as the basis of their decisions and that there exists a federal question, it is this defendants position that there exists no substantial federal question to justify the invoking of the Courts jurisdiction.

This age discrimination in employment matter is not unique either in the facts or the law.

The New Jersey courts simply applied the facts of this case to the well founded principles of *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed 2d 158 (1971) with the statutory scheme of the New Jersey Law Against Discrimination. The courts below sought the assistance of the legislative history of the A.D.E.A. and particularly § 623(F) (1) at 29 U.S.C. § 623. The court merely applied the impact theory and business necessity justification and found that labor negotiations, with economic considerations a primary factor, negated a finding of age discrimination in violation of the New Jersey LAD. It is merely an application of somewhat unique facts to established law.

Petitioners attempt to portray the New Jersey Appellate Division judgment as using economic cost as a basis for justifying alleged age discrimination. This could not be further from the truth. The trial court erroneously concluded initially, based upon essentially irrelevant statistics, that age discrimination in violation of the LAD existed. The court then, in attempting to apply the disparate impact theory to the federal law, found that economic or monetary considerations generally cannot be raised as a defense to a discrimination claim unless they have a relationship to the employment practice in question. The court, therefore, found no defense existing and in favor of plaintiffs. At no time did the trial court even consider defendants arguments as they related to labor negotiations. This was manifest error.

Petitioners mistakenly contend that the Appellate panel used economic considerations solely as a defense to

the discrimination claim. This is a misreading of the decision. The Appellate panel correctly found that labor negotiations constitute a clear, manifest relationship to the questioned employment practice, ie., salary scales, and that fiscal effect is a primary factor.

The Court stated, "Although monetary consideration cannot normally justify policies which by way of impact discriminate on the basis of age, ie., [citing *Geller v. Markham*, 653 *F.* 2d 1027 (2 Cir. 1980), *cert. den.* 451 U.S. 945 (1981)], the rule must be different with respect to labor negotiations—an exercise in which fiscal effect is a primary factor. As TASA noted in its brief, it is inevitable in the negotiation process that some employees will fare better than others. If facially neutral negotiating compromises which turn out to have an unintended disparate impact on people of differing age are discrimination under the A.D.E.A. or LAD, labor negotiations become chaotic. Compromises will often lie in the area of retroactivity which by definition will relate to seniority, a quality with a high correlation to age. Making new benefits prospective only is a rational and usual compromise often employed in negotiations." (A-10)

The disparate impact theory of *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed. 2d 158 (1971), applies when the employer's adverse action resulted not from any discriminatory motive but simply from application of facially neutral criteria that are alleged to have a disproportionate impact on members of a protected class *and* which cannot be justified by business necessity. The legis- of by the New Jersey Supreme Court's decision in *Her-* that not all age discrimination is prohibited but only, "arbitrary age discrimination." A reflection of this is § 623

(F) (1) which clearly indicates there is no prohibition, "where differentiation is based on reasonable factors other than age . . . " 29 *U.S.C.* § 623.

The Appellate panel merely applied the facts of this case to the impact theory and found that labor negotiations with economic considerations a primary factor negated a finding of age discrimination in violation of the LAD. The Court found that in the absence of intentional discrimination, *i.e.* proof of discriminatory intent and purpose, a facially neutral provision in a labor contract which impacts adversely on an older age group in an incidental manner does not violate the ADEA or the LAD.

Petitioner's final argument is specious and is disposed of by the New Jersey Supreme Court's decision in *Hermann v. Fairleigh Dickinson Univ.*, 183 *N.J. Super* 500 (App. Div. 1982), *cert. den.* 91 *N.J.* 573 (1982), where the Court limited the multiple avenues of recourse available to plaintiffs by the election available pursuant to the New Jersey Law Against Discrimination, specifically, *N.J.S.A.* 10:5-13 and 5-27. This Court will not review the interpretation of state law by the highest court of the State.

CONCLUSION

Respondent submits that it is difficult to escalate any of the issues presented, without more, into a matter of important and substantial federal issues requiring resolution by this Court. It is a case that hardly transcends the immediate interests of the litigants and affects only the parties to this particular dispute.

An application of the consideration governing review on certiorari, *U.S. Sup. Ct. Rule* 17, 28 U.S.C.A., and the established case law, requires a denial of the petition for certification.

Respectfully Submitted,

ROTTKAMP & FLACKS
Attorneys for Respondent Trenton Board of Education
795 Parkway Avenue
Lexington Mews, Suite A-6
Trenton, NJ 08618
(609) 882-0556

ROBERT B. ROTTKAMP, JR., Esq.
Of Counsel and on the Brief

ROBERT M. SCHWARTZ
2109 Pennington Road
Trenton, NJ 08638
(609) 771-9080
Attorney for Trenton Administrators and Supervisors Association

Dated: April 3, 1986